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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9 JESSE OLIVAR,

10 Plaintiff,

No. CIV S-03-0891 GGH PS

11 vs.

12 JOHN E. POTTER,

13 Defendant.

ORDER

14 _____/
15 Previously pending on this court's law and motion calendar for January 19, 2006,
16 was plaintiff's request for appointment of counsel, filed October 18, 2005, defendant's request
17 for status conference, filed October 31, 2005, and defendant's motion to strike the amended
18 complaint, filed November 14, 2005.

19 I. Motion to Strike

20 This action is proceeding on the amended complaint filed May 15, 2003. On
21 October 31, 2005, plaintiff filed a document entitled, "amended complaint," which the court
22 construes as a second amended complaint. Defendant's motion to strike is addressed to that
23 complaint.

24 Once an answer has been filed, a party may amend a pleading only by leave of
25 court or by written consent of the adverse party. See Fed. R. Civ. P. 15(a). An answer was filed
26 on July 25, 2003. Plaintiff has filed neither a motion to amend nor a stipulation to amend the

1 complaint signed by all parties. Plaintiff's amended complaint will therefore be stricken without
2 prejudice. Plaintiff shall file a proposed third amended complaint accompanied by a motion to
3 amend within fourteen days of the hearing.

4 II. Request for Appointment of Counsel

5 Any successful application for appointment of counsel must comply with criteria
6 set forth in Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301 (9th Cir. 1981). Before
7 appointing counsel to plaintiff, the Ninth Circuit's decision in Bradshaw requires the court to
8 consider (1) plaintiff's financial resources, (2) the efforts already made by plaintiff to secure
9 counsel, and (3) plaintiff's likelihood of success on the merits. Id. at 1318. Appointment of
10 counsel is not a matter of right. See Ivey v. Board of Regents, 673 F. 2d 266 (9th Cir. 1982).

11 Because plaintiff is proceeding in forma pauperis, the first factor, which relates to
12 his financial condition, is a fortiori resolved in his favor. Nevertheless, plaintiff has given no
13 indication of his efforts to secure counsel on his own, and the court cannot determine that
14 plaintiff is likely to succeed on the merits. Therefore, his request for appointment of counsel is
15 denied.

16 Conclusion

17 Accordingly, IT IS ORDERED that:

- 18 1. Plaintiff's request for the appointment of counsel is denied.
19 2. Plaintiff's October 31, 2005 second amended complaint is stricken.
20 3. Plaintiff shall file a proposed third amended complaint with a motion to amend, within
21 fourteen days of the January 19, 2006 hearing.

22 DATED: 1/27/06

/s/ Gregory G. Hollows

23 _____
24 GREGORY G. HOLLOWES
25 U. S. MAGISTRATE JUDGE

26 GGH:076
olivar0891.mtn.wpd